DATO' HJ SHAHARI HJ HASSAN

v.

HJ SHAMSUDIN TALIB & ORS

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: N-01-249-96]
3 JULY 1998

MALAY CUSTOMARY LAW: *Negeri Sembilan - Office of Dato' Shahbandar of Sungai Ujong - Disputes - Whether civil courts have jurisdiction - Whether solely within jurisdiction of Dewan - Malay customs and Adat - Scope of Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus - State Constitution of Negeri Sembilan, arts. XV, XVI, XXXII & Chapter XV - Natural justice - Right to be heard*

The appellant was the Dato' Shahbandar of Sg Ujong ('Dato Shahbandar') and at the material time also the head of the Adat Waris di Air Luak Sg Ujong ('Waris di Air'). The first to the fifth respondents were at the material time members of the Waris di Air while the sixth respondent was and still is the Undang of Sg Ujong. The seventh respondent is the State Government of Negeri Sembilan.

The appellant was appointed the Dato Shahbandar in 1983. In 1994 however, a memorandum prepared and signed by the first respondent was presented to the sixth respondent in accordance with the customary laws of Sg Ujong. The memorandum spelt out the alleged wrong-doings, misdeeds and misbehaviour committed by the appellant. On receiving the memorandum, the sixth respondent referred the matter to the Dewan. The Dewan then made a decision and formally removed the appellant as the Dato' Shahbandar.

The appellant filed an action challenging the decision of the Dewan in respect of his removal. After filing their statements of defence, the first to the sixth respondents took out a summons-in-chambers under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the appellant's writ of summons and statement of claim on the ground that such statement of claim was scandalous, frivolous or vexatious and an abuse of the process of the court. The sixth respondent deposed that the appellant had no right to challenge the decision of the Dewan and also that his removal was an issue involving the customary laws of Sg Ujong and that that issue could only be decided by the Dewan and that the court had no jurisdiction to decide on the issue by virtue of art. XVI of the State Constitution.

The learned trial judge held that the court had no jurisdiction to adjudicate on the issues raised by the appellant. The writ of summons and statement of claim were therefore struck off. Hence this appeal. Among the issues for consideration were: (i) whether the civil court had jurisdiction to adjudicate on the dispute; and (ii) whether there had been a breach of the rules of natural justice.

Held:

[1] The election or succession to or the removal from or vacation of the office of the Dato' Shahbandar of Sg Ujong should be done in accordance with the Malay custom of Negeri Sembilan, in particular the Malay custom of Sg Ujong. The Dewan which has the capability to decide and determine the issue on Malay custom is the best avenue for such matters and the court should decline jurisdiction in such matters.

[2] The position of the Dato Shahbandar of Sg Ujong is enshrined in the State Constitution, Chapter XV. His status is raised almost to that of a Ruling Chief and his status and position is protected by the State Constitution and art. XVII of the State Constitution makes him a permanent member of the Dewan. Special recognition is given to him under the State Constitution and the Dewan therefore is the best avenue to decide on any related dispute.

[3] The appellant was given the opportunity to be heard before the elders but had failed to do. He could not therefore complain that there had been a breach of the rules of natural justice.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu merupakan Dato' Shahbandar Luak Sg Ujong ('Dato' Shahbandar') dan pada masa yang berkenaan dia juga merupakan ketua Adat Waris di Air Luak Sg Ujong ('Waris di Air'). Pada masa tersebut responden-responden pertama sehingga kelima merupakan ahli-ahli Waris di Air manakala responden keenam adalah Udang Sg Ujong. Responden ketujuh adalah Kerajaan Negeri Sembilan.

Perayu telah dilantik sebagai Dato' Shahbandar dalan tahun 1983 dan kira-kira dalam tahun 1994, suatu memorandum, yang disediakan dan ditandatangani oleh responden pertama, telah dikemukakan kepada responden keenam menurut undang-undang adat Sg Ujong. Memorandum tersebut telah menyenaraikan kesalahan, tindakan tidak patut dan kelakuan tidak patut yang dilakukan oleh perayu. Setelah menerima memorandum tersebut, responden keenam telah merujuk perkara tersebut kepada Dewan. Dewan kemudiannya telah membuat keputusan dan perayu telah disingkirkan sebagai Dato' Shahbandar.

Perayu telah memfailkan tindakan di mahkamah mencabar keputusan Dewan berkenaan dengan penyingkiran tersebut. Setelah memfailkan pernyataan-pernyataan pembelaan, responden-responden pertama sehingga keenam telah mengeluarkan suatu saman dalam kamar di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan writ saman dan pernyataan tuntutan perayu atas dasar bahawa pernyataan tuntutan tersebut adalah bersifat skandal, remeh-temeh ataupun menyusahkan dan merupakan suatu penyalahgunaan proses mahkamah. Responden keenam menyatakan bahawa perayu tidak ada hak untuk mencabar keputusan Dewan dan juga bahawa penyingkiran tersebut adalah suatu isu yang melibatkan undang-undang adat Sg Ujong dan bahawa isu tersebut hanya dapat diputuskan oleh Dewan dan bahawa mahkamah tidak ada bidangkuasa untuk memutuskan isu tersebut berdasarkan Perkara XVI Perlembagaan Negeri.

Hakim perbicaraan memutuskan bahawa mahkamah tidak ada bidang kuasa untuk menghakimi isu-isu yang dibangkit oleh perayu. Writ saman dan pernyataan tuntutan kemudiannya telah dibatalkan. Maka rayuan ini. Diantara isu-isu yang dipertimbangkan adalah: (i) samada mahkamah sivil mempunyai bidangkuasa untuk menghakimi pertikaian berkenaan dengan perayu; dan (ii) samada terdapatnya pelanggaran kaedah-kaedah keadilan asasi.

Diputuskan:

[1] Isu perlantikan ataupun penggantian ataupun penyingkiran atau pengosongan jawatan Dato' Shahbandar Sg Ujong harus dikendalikan menurut adat Melayu Negeri Sembilan, khususnya adat Melayu Sg Ujong. Dewan, yang mempunyai keupayaan untuk memutuskan dan menentukan isu berkenaan dengan adat Melayu, adalah tempat yang wajar sekali untuk perkara tersebut dan mahkamah tidak seharusnya mempunyai bidangkuasa atas perkara ini.

[2] Jawatan Dato' Shahbandar Sg Ujong adalah termaktub dalam Perlembagaan Negeri, Bab XV. Tarafnya dinaikkan hampir kepada taraf Ketua Pemerintah dan taraf dan jawatannya dilindungi oleh Perlembagaan Negeri dan Perkara XVII Perlembagaan Negeri menjadikannya ahli tetap Dewan. Pengiktirafan khas diberi kepadanya di bawah Perlembagaan Negeri dan maka dengan itu Dewan adalah tempat yang wajar sekali untuk menyelesaikan sebarang pertikaian yang berkaitan.

[3] Perayu telah diberi peluang untuk didengarkan di hadapan ketua-ketua tetapi dia telah gagal berbuat demikian. Maka dia tidak harus mengadu bahawa telah terdapatnya pelanggaran kaedah-kaedah keadilan asasi.

[Rayuan ditolak.]

Cases referred to:

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28 ***(foll)***

Legislation referred to:

Federal Constitution, arts. 71(1), (2), 121(1A)
State Constitution of Negeri Sembilan, arts. XV(1), XVI, XXXII, Chapter XV
Rules of the High Court 1980, O. 18 r. 19(b), (d)

For the appellant - Tun Salleh Abbas (Megat Suffian Merican with him); M/s Salleh Abbas, Yaacob & Sofiah
For the 1st - 6th respondents - Hj Zamani Ibrahim (Mohd Fozi Md Zain with him); M/s Ruslan & Zamani
For the 7th respondent - Mary Lim SLA

[Appeal from High Court, Seremban; Civil Suit No: 22-138-1994]

Reported by Mariette Peters-Goh

JUDGMENT

Lamin Mohd Yunus JCA:

This is an appeal against the decision of the learned judge of the High Court of Seremban who allowed the application of the defendants/respondents Nos. 1 to 6 to strike out the writ and the amended statement of claim of the plaintiff under O. 18 r. 19 of the Rules of the High Court 1980. The learned judge in his grounds of judgment dealt with a number of issues including that of natural justice. He finally decided in favour of the defendants/respondents (the applicants) on the ground that the court had no jurisdiction to hear the appellants' claim as he was bound by the Federal Court's decision in *Dato Menteri Othman bin Baginda & Anor. v. Dato Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ 28.

In *Dato Menteri Othman's* case, the Federal Court by a majority decision (4 against 1) decided that the appeal must be allowed for the reason that the civil court had no jurisdiction or must decline to exercise jurisdiction on the matter of the election of the 15th Undang of Jelebu, Negeri Sembilan. Raja Azlan Shah Ag. LP (as he then was) in the opening statement of his judgment said (at p. 31):

> We have been entrusted with a grave and delicate issue – whether or not to issue a declaration that the purported election of the 15th Undang of Jelebu is *ultra vires* adat Laws and constitution of Luak of Jelebu ...

and he recognised that (at p. 32):

> Election of Undangs has since time immemorial been made in accordance with the ancient customary laws of their respective luaks.

He concluded that (at p. 33)

> ... the dewan is a far more suitable forum for discharging that function than a panel of five judges. It is open to the courts in this country to refuse a remedy on the ground that it is *forum non conveniens*. This doctrine is that a court may decline to exercise jurisdiction on the ground that another body would be more appropriate.

Salleh Abas, FJ (as he then was) concluded that the court of law has no jurisdiction to try the dispute and he said (p. 34):

> the Dewan has the authority to make the determination, the advice so expressed should bring the matter to an end.

In the words of Ibrahim Manan FJ (as he then was) (at p. 36):

> that the Dewan is intended to be the sole authority to determine and advise on the dispute.

Hashim Yeop A. Sani, J (as he then was) has this to say (at pp. 36-37):

> In the context of the Negeri Sembilan Constitution the Dewan Keadilan must surely be regarded as the custodian of the adat in Negeri Sembilan. The constitution of the members of the Dewan Keadilan would indicate this very intention. The advice of the Dewan Keadilan in the matter of adat must therefore be regarded as binding and conclusive for otherwise there would be uncertainty.

And he concluded:

> It necessary follows that to enlarge the jurisdiction of the court to include adjudication on such matters as succession of a Ruling Chief would likewise to my mind be *ultra vires* Article 71 (of the Federal Constitution).

Suffian LP (as he then was) delivering his dissenting judgment was more concerned with the effect of the ouster clause in both the Federal and State Constitutions and as he found that it has not been done "in clear language" therefore the civil court has jurisdiction to adjudicate on the dispute. He was not, as it were, rushing to adjudicate. He has his anxiety for he said (at p. 39):

> Whether or not the Undang has been validly elected is of course a delicate question, and a political question which is best solved by political means; but if the constitution and law require, as I think they do, that the matter be resolved by the court, then until the constitution has been suitably amended, the court has no alternative but to embark on the task as best as it can, though that will have the unfortunate effect of throwing the court into the political arena. So that courts are not turned into a political forum, I would rather that State constitutions be amended by the appropriate authorities, so that future

> disputes regarding succession are kept out of our way and decided by persons or bodies better equipped to do so.

Like any other Ruling Chief in Negeri Sembilan, a person assumes the office of Dato' Shahbandar of Sungai Ujong by way of an election and in the words of art. XV(1) he shall be a person "Lawfully elected **... in accordance with the custom** of the luak of Sungai Ujong."

In Negeri Sembilan rightly it is the Dewan which has the final authority to decide on any issue "relating to Malay Custom in any part of the State including questions relating to the election or succession ... of office of any of the Ruling Chiefs or on other matters ... . (Article XVI(1)).

So the election to the office of Dato' Shahbandar comes within the ambit of the Adat for it is "in accordance with the custom of the luak of Sungai Ujong" and certainly it is an issue "relating to Malay Custom" and in the instant case it is a custom of the luak of Sungai Ujong, a part of Negeri Sembilan. Conversely therefore anything done not in accordance with the Adat must necessarily result in the decision being "tidak sah" (not valid).

In the memorandum submitted by anak-anak waris di-Air luak Sungai Ujong, Dato' Shahbandar, the appellant was accused of "tidak amanah dan jujur menjalankan tugas-tugasnya sehingga aturan adat dan pusaka menjadi kucar-kacir, kuncang kecoh dan kusut masai" and the memorandum cited a series of incidents relating to for example acts of maladministration such as appointments and dismissals not done according to the Adat or contrary to the decisions of the Dewan and therefore not valid. Many more incidents of improper conduct were related. On those grounds, the memorandum contended that the appellant was not qualified to hold the post of Dato' Shahbandar. I do not propose to mention the invitation extended to the appellant to attend the "kerapatan" on two occasions and his refusal to attend and his written representation as they have been dealt with by my learned brother judge Mokhtar Hj. Sidin, JCA.

The decision otherwise referred to as the "advise" of the Dewan must be respected as being the final arbiter on all issues referred to it. Only those belonging to or coming within the jurisdiction of the Adat and properly elected leaders may administer the Adat. It is therefore implicit that those who are not of the Adat Perpateh may not sit in judgment of their fellow Adat followers. If I may liken this to a situation relating to the administration of Islamic Law. Only qualified Muslims sit in a Syariah Court. Rightly the Civil Court has divorced itself from the Syariah Courts (art. 121(1A) of the Federal Constitution). Clause (1A) of art. 121 of the Federal Constitution reads:

> (1A) The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

The real intent of this clause in my view is to make it clear that no Civil Court shall deal with any matter pertaining to Islam. It is only proper that it is so because the Civil Courts are manned by judges of various races and religions and all of them have had their education in civil law and rightly therefore they cannot assume competency in Islamic Law. In similar vein there is a case to be argued in favour of the proposition that the Adat Perpateh shall only be administered by those professing the said customary law. The Adat is jealously guarded and that explains why Negeri Sembilan is singularly different from the other states so that the practice of the Adat is spelt out in the State Constitution which makes reference to "ancient constitution and ancient custom ... shall continue as heretofore." (art. XXXII); hence the familiar expression "BIAR MATI ANAK JANGAN MATI ADAT" and it is often repeated as a reminder for any breach of the Adat. The Adat is not spelt out anywhere in the State Constitution of Negeri Sembilan. For example in regard to the problem of election to office, it is merely expressed as to be "in accordance with the custom of the luak" concerned. In *Dato Menteri Othman's* case, the court was in fact unanimous in its view that the Dewan was a more appropriate body to deal with such a dispute for it is better equipped in the sense that the Dewan is learned in the Adat and not the civil court. The dissent in that case was only in regard to the effect of the ouster clause. There can be another reason in support of the proposition that the civil court shall not interfere in matters pertaining to the Adat. The Civil Court in our country is the brainchild of the English Common Law practicing the adversary system with which we have found ourselves very comfortable and a divorce from it is unthinkable. That does not mean that it can assume jurisdiction supervisory or otherwise in matters of the Adat. If the writ and the amended statement of claim had not been struck out and the case went for trial, then the normal court proceedings will take place meaning that the adversarial system will play its role with full force and effect. This may entail examinations and cross-examinations of elders not to mention the respectable members of the Dewan and this if without proper control may adversely affect the dignity of the Dewan as a whole. The very nature of the proceedings is foreign to problem solving in the Adat system which is conducted by way of discussions and examinations of issues at the first instance such as at a "kerapatan waris" and then followed at a "kerapatan luak" and in the present case their unanimous decisions were formulated in a memorandum and forwarded to the six respondent for presentation to the Dewan for final determination. The Adat never envisaged that its proceedings be supervised or corrected by another body (the court) which has no knowledge of its workings. This is justice within the Adat and not justice within the Law. Also there are still arguments and differences between us, judges in the civil court as to whether declaration or *certiorari* for example is the appropriate remedy in particular cases in order to attain procedural justice. To think of wandering into other people's homes, I think we should restrain ourselves.

For the reasons that I have just discussed I am of the view that in any dispute in matters of the Adat, the Dewan shall be the correct and the proper body to be the final arbiter and not the Civil Court. The integrity and competency of the Dewan must be respected. Any attempt to approach the Civil Court for a final solution through its supervisory jurisdiction in matters of the Adat must be taken as an affront to the Dewan.

There is the other issue and that is whether there has been compliance with the rules of natural justice in the present case. I do not think that it is necessary or even proper for me to enter into a discussion as to whether rules of natural justice as understood in the civil law have been complied or not by the Dewan in view of my finding that the Adat is the preserve of the Dewan. My learned brother Mokhtar Hj. Sidin, JCA has however made some observations on it and I go along with him. However I must not fail to lay emphasis here that His Royal Highness, the Yang di-Pertuan Besar presides at every sitting of the Dewan unless he is for some reason indisposed. Every Luak is represented by its Ruling Chief and all of them must be presumed to be well versed in the Adat. Accordingly I have no doubt in my own mind as to the justice of the case when it is placed before the Dewan for its determination because it will be decided in the best traditions of the Adat Perpateh.

I have had the opportunity of going through the draft judgment of my learned brother Mokhtar Hj. Sidin, JCA and I entirely agree with his reasoning and conclusion.

In the circumstances, the appeal must be dismissed with costs. The deposit shall be paid to the respondents towards taxed costs.

Ahmad Fairuz JCA:

I have had the advantage of reading the draft judgments of my learned brothers, Tan Sri Dato' Hj. Lamin bin Hj. Mohd Yunus, President, Court of Appeal, and Datuk Mokhtar bin Hj. Sidin, judge, Court of Appeal, and I respectfully agree, for the reasons given in both judgments, that the appeal must be dismissed with costs. I also agree that the deposit be paid to the respondents towards taxed costs.

Mokhtar Sidin JCA:

We have reserved our decision in respect of this appeal. I now give my decision and my reasons.

To understand the appeal in its proper perspective, it is better for me to set out the facts of the case leading to the appeal. The appellant/plaintiff was the Dato' Shahbandar Luak Sungai Ujong and at that material time was also the head of the Adat Waris di Air Luak Sungai Ujong (hereinafter referred to as "Waris di Air"). The 1st to 5th respondents at the material time were members of Waris di Air. The 6th respondent at the material time was the Undang of Sungai Ujong (and at the time when this appeal was heard is still the Undang of Sungai Ujong). The 7th respondent is the State Government of Negeri Sembilan Darul Khusus. Though there were other defendants being named in the court below, for reasons best known to the appellant there were no appeals against them.

The appellant was appointed the Dato' Shahbandar some time in 1983. At the time of his appointment the Undang of Sungai Ujong was not the 6th respondent but his predecessor. According to the statement of defence of the 1st to 5th respondents on or around 24 July 1994 there was a gathering of Waris di Air (satu kerapatan waris-waris) attended among others by the elders of the four tribes of Waris di Air (ibu-ibu soko yang tertua dan waris-waris yang tertua dari keempat-empat perut Waris di Air). At that gathering a resolution was passed against the appellant whereby the Waris di Air voted that it had no confidence in the appellant holding the post of Dato' Shahbandar and he should be removed from that office. The statement of defence also stated that at that time the post of Dato' Panglima Besar Balai Adat Waris di Air was the 1st respondent. It was also decided at that gathering that the resolution be forwarded to the Dato' Undang of Sungai Ujong (6th respondent) who was and is the Ruling Chief of Sungai Ujong.

As a result of that a memorandum was prepared and signed by the 1st respondent and that memorandum was presented to the 6th respondent in accordance with the customary law of Sungai Ujong. The memorandum which was prepared by the elders of Waris di Air spelt out the wrong-doings, misdeeds and misbehaviours committed by the appellant in particular the appellant's letter dated 11 July 1994 to the Yang di-Pertuan Besar of Negeri Sembilan whereby he questioned the appointment of the 6th respondent as the Undang of Sungai Ujong which the appellant claimed to be not in accordance with the customary law of Sungai Ujong and the awards made by the Yang di-Pertuan Besar to certain individuals. Another gathering was held on 13 August 1994 whereby the memorandum was presented to the 6th respondent and the elders of the Waris di Air requested the removal of the appellant as the Dato' Shahbandar of Sungai Ujong.

The statement of defence of the 1st to the 5th respondents also stated the prerogative of removing the appellant as Dato' Shahbandar of Sungai Ujong belonged to the elders of the Waris di Air. Subsequent to that the Dewan Keadilan dan Undang (hereinafter referred to as "the Dewan") removed the appellant as the Dato' Shahbandar of Sungai Ujong.

The 6th respondent in his statement of defence stated that he was not involved in the removal of the appellant as the Dato' Shahbandar of Sungai Ujong nor was he a party to the removal. He stated further the appointment and the removal of the Dato' Shahbandar of Sungai Ujong is governed by art. XV of the State Constitution and not within his powers to do so. The appointment and removal must be in accordance with the customary law of Sungai Ujong. As such the removal was properly done and in order. In his defence he stated that on receiving the memorandum from the elders the 6th respondent then referred the matter to the Dewan and also informed the 7th respondent. The Dewan then made a decision to remove the appellant as the Dato' Shahbandar of Sungai Ujong. As a result of that decision the appellant was formally removed as the Dato' Shahbandar of Sungai Ujong and the 7th respondent stopped all payments of allowances and other perks of Dato' Shahbandar of Sungai Ujong to the appellant.

The 7th respondent in its statement of defence denied that it was involved in the resolution passed and was instrumental in the planning to remove the appellant as the Dato' Shahbandar of Sungai Ujong. The 7th respondent also denied that it was involved in the gathering organised by the 1st to 5th respondents when the resolution to remove the appellant as the Dato' Shahbandar was adopted. The 7th respondent further stated the decision to remove the appellant as the Dato' Shahbandar of Sungai Ujong was by the Dewan and that decision was conveyed to it. The 7th respondent on being informed of the removal, stopped all payments in respect of allowances and perks to the appellant from 1 September 1994. A letter dated 6 October 1994 was sent by the 7th respondent to the appellant informing him of this.

After the statements of defence of the 1st to 7th respondents were filed, the 1st to 6th respondents took out summons-in-chambers under O. 18 r. 19(b) and (d) of the Rules of the High Court to strike out the appellant's writ of summons and the statement of claim on the ground that the statement of claim was scandalous, frivolous or vexatious and an abuse of the process of the court. In the affidavit in support of the application, the 6th respondent deposed that the appellant has no right to challenge the decision of the Dewan in respect of the appellant's removal as Dato' Shahbandar of Sungai Ujong in court. The 6th respondent further stated that the removal of the appellant as Dato' Shahbandar of Sungai Ujong was an issue involving the customary law of

Sungai Ujong and that issue could only be decided by the Dewan. For that reason the court has no jurisdiction to decide on the issue by virtue of art. XVI of the State Constitution.

At the High Court the learned trial judge allowed the application by the six respondents and struck off the appellant's writ of summons and the statement of claim. Being dissatisfied with the decision of the learned trial judge, the appellant now appealed to us. In his judgment the learned trial judge said that he was bound by the majority decision of the Federal Court in the case of *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ 28 (hereinafter referred to as the *Dato Menteri Othman* case). Because of that decision the learned trial Judge held that the court has no jurisdiction to adjudicate on the issues raised by the appellant in the present appeal.

Tun Mohd. Salleh bin Abas appeared before us as counsel for the appellant. Incidentally he was one of the judges who gave judgment in the *Dato Menteri Othman* case and formed the majority. He submitted before us that the court is not excluded from hearing the appellant's statement of claim and as such the learned trial judge had erred in his decision. He went on to say that the *Dato Menteri Othman* case is not applicable because the present appeal could be distinguished from that case. He submitted further that in the *Dato Menteri Othman* case the issue was on the appointment of the Undang who was one of the Ruling Chiefs of Negeri Sembilan. Article 71(1) and (2) of the Federal Constitution guaranteed the State Authority (the Dewan) the right to determine any dispute in respect of succession as a Ruler or as a Ruling Chief. Article 71(1) and (2) of the Federal Constitution provides:

> 71 (1) The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State; but any dispute as to the title to the succession as Ruler of any State shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State.
>
> (2) Clause (1) shall, with the necessary modifications, apply in relation to a Ruling Chief of Negeri Sembilan as it applies to the Ruler of a State.

Counsel submitted that the Dato' Shahbandar is not a Ruling Chief and as such the protection of art. 71(1) and (2) of the Federal Constitution is not available to him. In view of that it was submitted that the *Dato Menteri Othman* case is not applicable and the court has jurisdiction to hear the writ.

With the greatest respect to the learned counsel I beg to differ. It is clear to me that the issue in that case arose from art. XVI of the State Constitution then. It is to be noted that art. XVI of the State Constitution was amended after the decision of the *Dato Menteri Othman* case. Before the amendment art. XVI of the State Constitution reads:

> XVI. There shall be a Dewan Keadilan dan Undang to be called in English "The Council of the Yang di-Pertuan Besar and the Ruling Chiefs" hereinafter referred to as the Dewan to advise on questions relating to Malay Custom in any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs and to exercise such functions as may be conferred upon it by this Constitution or any other written law.

It appears to me that art. XVI of the State Constitution was a simple one clause article and there was no exclusion clause at all. There was also no mention of the election, succession or removal from or vacation of office of the Ruling Chiefs. It only referred to question relating to Malay custom or any matter reported to by His Highness and the Ruling Chiefs. To understand the majority decision of the Federal Court in the *Dato Menteri Othman* case, I have to look at the judgment carefully. In that case it was held that:

> (1) the Dewan Keadilan dan Undang is given power under the Constitution to advise on matters relating to Malay custom and as the Dewan in this case had blessed the appointment of the second defendant as the Undang of Jelebu, the court should not attempt to usurp the function of the Dewan, which is a more suitable forum for discharging that function;
>
> (2) the court should decline jurisdiction on the ground that it is *forum non conveniens* and that there is another body which is more appropriate and which has been given power under the Constitution of the State to decide the matter;

It is clear to me especially in regard to what has been held by the Federal Court matters in respect of Malay custom or other matters which may be referred to it by His Highness and the Ruling Chiefs in that under art. XVI of the State Constitution should be decided by the Dewan and the court should decline jurisdiction. Salleh Abas FJ (as he then was) at p. 33 said:

> Article 71(1) of the Federal Constitution makes provision that whilst the "Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State," the Federation, however, has to adopt a policy of non-interference and strict neutrality as regards a dispute as to the title or right of a particular individual to succeed as Ruler. This principle of strict neutrality is clearly stated in the second limb of Article 71(1) as follows:
>
> > but any dispute as to the title to the succession as Ruler of any State, shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State.

There can be no doubt that this principle is also applicable to a dispute relating to the appointment of an Undang because Clause (2) of this Article provides that:

> Clause (1) shall, with the necessary modifications, apply in relation to a Ruling Chief of Negeri Sembilan as it applies to the Ruler of State.

The State Constitution of Negeri Sembilan recognizes the continued application of the ancient constitution and ancient custom of the State so long as they are not inconsistent with the State Constitution (Article XXXII). Part of the ancient constitution and ancient custom is the concept of rulership. There exists five Ruling Chiefs (Article XIV) in addition to the royal personage styled as Yang di-Pertuan Besar of the State, and not as Sultan like the royal personage in other states (Article VII). The Ruling Chiefs are the Undangs of Sungai Ujong, Jelebu, Johol and Rembau and Tengku Besar of Tampin (Article XIV). The rulership in Negeri Sembilan State Constitution unlike that in other states is a composite concept, consisting of His Highness the Yang di-Pertuan Besar and at the five Ruling Chiefs (Article XXVIII). For the exercise of functions under the State Constitution, His Highness the Yang di-Pertuan Besar and at least three of the four Undangs must act (Article XXVIII(2)), but for the exercise of functions under the Federal Constitution only the Yang di-Pertuan Besar is required to perform them, although in performing those functions, His Highness is regarded as acting not only on his own behalf but also on behalf of the Ruling Chiefs as well (Article 160(2)). The reason why the Undangs are not required to perform the functions under the Federal Constitution must have understandably been due to the question of convenience. Because the definition of ruler is a composite one, the Constitution of the State itself was declared and ordained by His Highness together with the Ruling Chiefs (see preamble to the Constitution of Negeri Sembilan). His Highness the Yang di-Pertuan Besar is elected by the four Undangs (Article VII), whilst the Undangs themselves have to be elected in accordance with the custom of their respective territories (luaks) (Article XIV(1)). His Highness and the Ruling Chiefs and a few other persons are members of a Council known as the Dewan Ka'adilan dan Undang, in short "the Dewan". (Article XVI and Article XVII). The main function of the Dewan is "to advise on questions relating to Malay Custom in any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs."

The Dewan is the culmination of the lengthy political and constitutional developments of the State. It is the embodiment of traditional elements and values which are kept alive by the Constitution. It is a machinery to rationalize these elements so as to make them work under a modern democratic constitution. Until the present Constitution was promulgated in 1959 Negeri Sembilan had no written constitution. Her constitutional law, however, could only be found in the various treaties entered into by the Yang di-Pertuan Besar, the Undangs and the British Government. Besides these treaties, customary laws were allowed to continue side by side to govern the political, social and

economic life in the respective territories so long as they did not become a hindrance to the British policy. Indeed Negeri Sembilan itself was only constituted as a State by the treaty of July 13, 1889, whereby the parties concerned agreed to form "a Confederation of States to be known as the Negeri Sembilan." In 1895 this Confederated State joined the Federation of Protected Malay States of Perak, Selangor, Negeri Sembilan and Pahang. The formation of Malayan Union in 1946 and its subsequent transformation into the Federation of Malaya in 1948 did not give Negeri Sembilan a separate written constitution. It was only Independence in 1957 which finally gave her the present Constitution promulgated in 1959. Under this Constitution the ancient constitution and custom are preserved, "except as expressed herein", and "where not inconsistent with" the Constitution. *To rationalize and make this ancient constitution and custom work and to avoid disputes which could arise from many divergent interpretations of this ancient constitution and ancient custom, the Dewan is established with power "to advise on questions relating to Malay custom in any part of the State or other matters which may be referred to it by His Highness or any of the Ruling Chiefs." The expression "to advise on" in my judgment is not merely confined to the ascertainment and statement of customary law in an abstract and generalized way like a statute or an enactment. Neither is the expression restricted to mean only "to give an opinion". The expression "to advise on" must in my judgment be the ascertainment and the application of law on a given subject to a particular set of facts. The advice so expressed by the Dewan, irrespective of the language used by the clerk of the Dewan to record it, whether "giving its blessing or approval" or some other words clearly indicates the thinking and view of the Dewan and such opinion, since it comes from the highest and august body should be worthy of respect and obedience. It should not be ignored. There is no need for a provision in the Constitution saying that the advice is binding. Customary law, after all is based on the recognition and acceptance that a rule is binding, otherwise inconveniences and crisis would follow from disobedience thereto. What higher and better authority deserves and commands respect in the interpretation and explanation of customary law on this particular topic than the Dewan itself which consists of the Ruler of the States and other prominent persons? As an example of an advice being binding, is the advice pronounced by the Federal Court under Article 130 of the Federal Constitution when it exercises its advisory jurisdiction on a question referred to the court by the Yang di-Pertuan Agong for its opinion as to the effect of any provision of the Constitution. Such advisory opinion was expressed by the court in the Government of Malaysia v. Government of the State of Kelantan, as to the meaning of the word "borrow" under Article III(2) of the Federal Constitution. Here there can be no doubt that the court's opinion is binding, although there is no provision in the Federal Constitution which says that it is so.*

> *In conclusion, I find myself unable to subscribe to the view that the Dewan has no authority to resolve this dispute. This means that the court has no jurisdiction over the matter, as Article 71(1) clearly points to the way in which the dispute has to be settled, and by reference to the Dewan, the matter is closed.* (Emphasis made).

Hashim Yeop A Sani J (as he then was) in his judgment at pp. 36 and 37 said:

> In the context of the Negeri Sembilan Constitution the Dewan Keadilan must surely be regarded as the custodian of the adat in Negeri Sembilan. The constitution of the members of the Dewan Keadilan would indicate this very intention. The advice of the Dewan Keadilan in the matter of adat must therefore be regarded as binding and conclusive for otherwise there would be uncertainty.

As can be seen from the above, I am of the view that the decision of the majority was that the court should decline jurisdiction where the issues are matters pertaining to the customary law of that State, in particular matters as contained in art. XVI of the State Constitution where the Dewan is the best avenue to settle and decide on the issues. As such I am of the opinion that the learned counsel for the appellant is not correct when he said that the decision is only applicable to succession of the Ruler and the Ruling Chiefs.

The original art. XVI of the State Constitution did not have the words "election or succession to or removal from or vacation of office of any of the Ruling Chiefs". The Federal Court in the *Dato Menteri Othman* case interpreted the words "relating to Malay custom in any part of the state" to include succession of any of the Ruling Chiefs. The reason as can be seen from the judgment was that the succession was decided by way of Malay custom (adat). That being the case the Dewan is the best avenue to decide on it and for that reason the court should decline jurisdiction.

Now returning to the present appeal it is clear to me that the election or succession to or removal from or vacation of office of Dato' Shahbandar of Sungai Ujong should be done in accordance with the Malay custom (adat) of Negeri Sembilan in particular the Malay custom of Sungai Ujong. Any question or issue arising from that as decided by the *Dato Menteri Othman* case should be referred to the Dewan. The Dewan which has the capability to decide and determine the issue on Malay custom is the best avenue for such matter and the court should decline jurisdiction in such matter.

Even assuming for the moment that the counsel for the appellant was correct in his submission, I am of the view that the majority decision of the *Dato Menteri Othman* case is still applicable. I have examined the Constitution and I find that the position of Dato' Shahbandar of Sungai Ujong is enshrined in the State Constitution as can be seen in Chapter XV of the State Constitution. Chapter XV reads:

XV. Dato' Shahbandar of Sungai Ujong.

(1) Dato' Shahbandar Sungai Ujong shall be the person lawfully elected as head of the Waris di Ayer in accordance with the custom of the luak of Sungai Ujong.

(2) Without prejudice to the prerogatives, powers and jurisdiction of Dato' Klana as Undang, and subject to the provisions of this Constitution, there shall be consultation between him and Dato' Shahbandar in all matters affecting the affairs of the luak of Sungai Ujong.

Although he is only a chieftain in Sungai Ujong, for historical reasons his status as chieftain was raised to that almost of a Ruling Chief. It falls short of a Ruling Chief for the simple reason that there cannot be two Ruling Chiefs in any domain. His status and position is protected by the State Constitution so much so art. XVII of the State Constitution makes him a permanent member of the Dewan. His position is unlike the other numerous chieftains in all the districts in the State of Negeri Sembilan where no special recognition is given under the Constitution. It is to be observed that the election or succession to or removal from or vacation of office is similar to that of an Undang except it is done amongst smaller groups of people, that is Waris di Air of Sungai Ujong. In my view when there is any dispute in respect of that the Dewan is the best avenue and the court should decline jurisdiction.

It appears to me that after the decision of the *Dato Menteri Othman* case, art. XVI of the State Constitution was amended. Article XVI now reads as follows:

XVI. (1) There shall be a Dewan Keadilan dan Undang to be called in English "The Council of the Yang di-Pertuan Besar and the Ruling Chiefs" hereinafter referred to as the Dewan to advice on questions relating to Malay Custom in any part of the State including questions relating to the election or succession to or removal from or vacation of office of any of the Ruling Chiefs referred to in Article XIV or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs and to exercise such functions as may be conferred upon it by this Constitution or any other written law.

(2) The Menteri Besar may refer to the Dewan for its advice any question relating to Malay Custom in any part of the State including questions relating to the election or succession to or removal from or vacation of office of any of the Ruling Chiefs referred to in Article XIV.

(3) *The advice of the Dewan on questions relating to Malay Custom in any part of the State including advice on any question in relation to the election or succession to or removal from or vacation of office of any of the Ruling Chiefs referred to in Article XIV shall be final and shall not be challenged or called in question in any court on any ground.* (Emphasis made).

The amendments to this article was made in 1982. On reading the present Article XVI of the State Constitution it is clear to me the amendments were made to give effect to the majority decision in the *Dato Menteri Othman* case. The amendments made it clear what are the matters to be brought before the Dewan and the jurisdiction of the court has to be excluded on those matters. This has been legislated under cl. (3) of art. XVI. With this provision it is clear to me that any matter pertaining to the Malay custom in Negeri Sembilan is within the jurisdiction of the Dewan and the court has no jurisdiction to entertain it since its jurisdiction has been ousted by express words of the State Constitution. It is clear to me that the removal of the Dato' Shahbandar is one of the customs. As such it is clear that under the State Constitution the court has no jurisdiction to entertain the writ and the statement of claim filed by the appellant. The learned trial judge was right in striking out the appellant's writ and the statement of claim.

That is sufficient for me to dismiss the appellant's appeal. However, the learned counsel for the appellant raised the issue of natural justice in order to invite the court to exercise its jurisdiction over the matter.

In respect of this the learned counsel submitted that the issue to remove the appellant as Dato' Shahbandar of Sungai Ujong was first mooted in November 1985 but nothing came out of it. The reason for that, in my opinion, there was no Undang of Sungai Ujong and that matter could not be brought officially before the Dewan. As such the appellant remained the Dato' Shahbandar of Sungai Ujong until the appointment of the 6th respondent as the Undang of Sungai Ujong. After the appointment of the 6th respondent as the Undang of Sungai Ujong the issue to remove the appellant as Dato' Shahbandar was revived. It appears to me that the learned counsel for the appellant attempted to connect the move in 1985 and the present. I have gone through the affidavits and I found that the decision to remove the appellant as the Dato' Shahbandar was the result of gatherings in March and July 1994. Though the move in 1985 was mentioned the decision to remove him in March and July 1994 was not based on that at all. The decision to remove him was as a result of the appellant removing the various chieftains of Waris di Air and the letter dated 11 July 1994 written by him to His Highness. It is clear to me that the grounds for coming to the decision to remove the appellant are totally different from the one given in 1985. As such I found that there was no conspiracy as alleged by the appellant.

The present move to remove the appellant as Dato' Shahbandar began when the appellant removed some chieftains of Waris di Air. As a result of that the elders of the Waris di Air gathered in March 1994 and reinstated those chieftains which were removed by the appellant. Apparently the appellant was invited but he chose to ignore it and did not attend the gathering despite being

the head of Waris di Air. A second gathering was then held in July 1994 with the specific purpose of passing a resolution to remove the appellant as Dato' Shahbandar. The elders of Waris di Air asked the appellant to attend to answer charges of misdeeds and misbehaviours in respect of his letter dated 11 July 1994. Again the appellant refused to attend but some chieftains loyal to him attended the meeting. It is obvious to me that the appellant knew the purpose of that gathering. It is obvious to me from the affidavits that the appellant was asked to show cause why he should not be removed as the Dato' Shahbandar. There was no denial by the appellant in respect of this. At that gathering the resolution to remove the appellant as the Dato' Shahbandar was passed and adopted. A memorandum to that effect was drafted. In my view when the appellant was invited to attend the gathering he was given the opportunity to be heard before the elders. When he failed to do so he could not now complain that he was not given the opportunity to be heard. I found that up to that stage the elders gave the appellant the opportunity to be heard but he declined the opportunity.

It is clear to me that the memorandum of the resolution passed at the gathering in July 1994 was then presented to the 6th respondent by representatives of Waris di Air. The 6th respondent in his affidavit stated that though he as Undang of Sungai Ujong has the power to remove the appellant as Dato' Shahbandar of Sungai Ujong, he did not act to remove the appellant as the Dato' Shahbandar. Instead he referred the memorandum to the Dewan pursuant to art. XVI for its decision and a copy of it was also sent to the 7th respondent for its action.

The appellant complained that the 6th respondent did not consult him as required by art. XV of the State Constitution when he decided to remove him as Dato' Shahbandar. As I have explained earlier the 6th respondent though he has the power did not remove the appellant. His removal was done by the elders of Waris di Air and by the Dewan when the matter was referred to it by the 6th respondent. The 6th respondent only gave his blessing to the memorandum presented to him by the heads of Waris di Air. Thus I could not see any reason why the 6th respondent should consult the appellant.

Though the elders of the Waris di Air had decided to remove the appellant as the Dato' Shahbandar, the authority to remove him lies with the Dewan. That is the reason why the decision made in 1985 by the elders of Waris di Air was of no effect and the appellant remained as Dato' Shahbandar until 1 September 1994 when the Dewan decided to remove him. It appears to me that the Dewan is the sole authority to remove or not to remove him. It is clear to me from the documents presented to the court that the Dewan decided to remove the appellant as Dato' Shahbandar of Sungai Ujong and that decision was conveyed to the 7th respondent. The 7th respondent acting on that decision stopped payment of all allowances and perks to the appellants.

It is clear to me that the Dewan is the master of its own procedure. It appears to me that there is no fixed rule and procedure when it deliberates and makes decision on any issue. For the appellant's case it is clear to me that the appellant did make a representation in writing against the memorandum presented by the Waris di Air. The Dewan deliberated on the memorandum by the Waris di Air and the representation made by the appellant and decided that the appellant be removed as Dato' Shahbandar of Sungai Ujong. An excerpt of the minutes of the Dewan stated as follows:

> Dewan telah membincangkan secara mendalam surat bantahan bertarikh 16.08.1994 daripada Hj. Shaari bin Hj. Hassan kepada DYMM Tuanku Pemangku Yang Di-Pertuan Besar, Negeri Sembilan mengenai pemecatannya sebagai Dato' Shahbandar Sg. Ujong dan surat rayuan bertarikh 16hb Ogos 1994 mengenai penahanan pemakanan kepada YAB Menteri Besar Negeri Sembilan Darul Khusus. Dewan memutuskan bahawa pemecatan Hj. Shaari bin Hj. Hassan sebagai Dato' Shahbandar teratur dan mengikut adat dan andika Luak Sg. Ujong. Dewan juga bersetuju dengan keputusan Kerajaan Negeri berhubung dengan pemberhentian pemakanan sejak 30hb Sept., 1994.

Counsel for the appellant admitted that the appellant was at the Dewan but was not called in to participate in the deliberation. It was submitted by the learned counsel that since he was not called in to present his case he was not given the opportunity of being heard. As I have said earlier the Dewan is the master of its own procedure. Since it has decided to deliberate on the representation made by the appellant in writing, it could do so. The fact remains that the appellant did make a representation in writing to the Dewan, and that to me was the opportunity of being heard.

For the reasons stated above I could not find any merit in the appeal by the appellant. I would therefore dismiss the appeal by the appellant with costs. The decision of the learned trial judge is hereby affirmed. The deposit is to be paid to the respondents towards taxed costs.